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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 10-1259, United States v.  
5 Jones.

6 Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE PETITIONER

9 MR. DREEBEN: Mr. Chief Justice, and may it  
10 please the Court:

11 Since this Court's decision in Katz v.  
12 United States, the Court has recognized a basic  
13 dichotomy under the Fourth Amendment. What a person  
14 seeks to preserve as private in the enclave of his own  
15 home or in a private letter or inside of his vehicle  
16 when he is traveling is a subject of Fourth Amendment  
17 protection. But what he reveals to the world, such as  
18 his movements in a car on a public roadway, is not.

19 In Knotts v. United States, this Court  
20 applied that principle to hold that visual and beeper  
21 surveillance of a vehicle traveling on the public  
22 roadways infringed no Fourth Amendment expectation of  
23 privacy.

24 CHIEF JUSTICE ROBERTS: Knotts, though,  
25 seems to me much more like traditional surveillance.

1 You're following the car and the beeper just helps you  
2 follow it from a -- from a slightly greater distance.  
3 That was 30 years ago. The technology is very different  
4 and you get a lot more information from the GPS  
5 surveillance than you do from following a beeper.

6 MR. DREEBEN: The technology is different,  
7 Mr. Chief Justice, but a crucial fact in Knotts that  
8 shows that this was not simply amplified visual  
9 surveillance is that the officers actually feared  
10 detection in Knotts as the car crossed from Minnesota to  
11 Wisconsin. The driver began to do certain U-turns and  
12 the police broke off visual surveillance. They lost  
13 track of the car for a full hour. They only were able  
14 to discover it by having a beeper receiver in a  
15 helicopter that detected the beeps from the radio  
16 transmitter in the can of chloroform.

17 CHIEF JUSTICE ROBERTS: But that's a good  
18 example of the change in technology. That's a lot of  
19 work to follow the car. They've got to listen to the  
20 beeper; when they lose it they have got to call in the  
21 helicopter. Here they just sit back in the station and  
22 they -- they push a button whenever they want to find  
23 out where the car is. They look at data from a month  
24 and find out everywhere it's been in the past month.  
25 That -- that seems to me dramatically different.

1                   MR. DREEBEN: But it doesn't expose  
2 anything, Mr. Chief Justice, that isn't already exposed  
3 to public view for anyone who wanted to watch, and that  
4 was the crucial principle that the Court applied --

5                   JUSTICE KENNEDY: Well, under that  
6 rationale, could you put a beeper surreptitiously on the  
7 man's overcoat or sport coat?

8                   MR. DREEBEN: Probably not, Justice Kennedy;  
9 and the reason is that this Court in *Karo v. United*  
10 *States* -- *United States v. Karo* -- specifically  
11 distinguished the possibility of following a car on a  
12 public roadways from determining the location of an  
13 object in a place where a person has a reasonable  
14 expectation of privacy.

15                  JUSTICE KENNEDY: Oh -- oh, no. This is  
16 special device. It measures only streets and public  
17 elevators and public buildings.

18                  MR. DREEBEN: In that event, Justice  
19 Kennedy, there is a serious question about whether the  
20 installation of such a device would implicate either a  
21 search or a seizure. But if it did not, the public  
22 movements of somebody do not implicate a seizure.

23                  JUSTICE KENNEDY: And on that latter point,  
24 you might just be aware that I have serious reservations  
25 that there wasn't -- that there -- about the way in

1     which this beeper was installed. But you can get to  
2     that at -- at your convenience.

3                   JUSTICE SCALIA: Mr. Dreeben, I'd like to  
4     get to it now.

5                   (Laughter.)

6                   MR. DREEBEN: Happy to, Your Honor.

7                   JUSTICE SCALIA: I have to give a little  
8     prologue to my question. When -- when wiretapping first  
9     came before this Court, we held that it was not a  
10    violation of the Fourth Amendment because the Fourth  
11    Amendment says that the -- "the people shall be secured  
12    in their persons, houses, papers and effects against  
13    unreasonable searches and seizures; and wiretapping just  
14    picked up conversations. That's not persons, houses,  
15    papers and effects.

16                   Later on, we reversed ourselves and, as you  
17    mentioned, Katz established the new criterion, which is,  
18    is there an invasion of privacy? Does -- are you  
19    obtaining information that a person had a reasonable  
20    expectation to be kept private? I think that was wrong.  
21    I don't think that was the original meaning of the  
22    Fourth Amendment. But nonetheless it's been around for  
23    so long, we are not going to overrule that.

24                   However, it is one thing to add that privacy  
25    concept to the Fourth Amendment as it originally existed

1 and it is quite something else to use that concept to  
2 narrow the Fourth Amendment from what it originally  
3 meant. And it seems to me that when that device is  
4 installed against the will of the owner of the car on  
5 the car, that is unquestionably a trespass and thereby  
6 rendering the owner of the car not secure in his  
7 effects -- the car is one of his effects -- against an  
8 unreasonable search and seizure. It is attached to the  
9 car against his will, and it is a search because what it  
10 obtains is the location of that car from there forward.  
11 Now, why -- why isn't that correct? Do you deny that  
12 it's a trespass?

13 MR. DREEBEN: It may be a technical  
14 trespass, but it was equally a technical trespass in the  
15 United States v. Karo when a can of ether was  
16 transferred to somebody that had -- and it had a radio  
17 transmitter --

18 JUSTICE KENNEDY: Well, but the owner of the  
19 can at the time it was installed consented, and that is  
20 not this case. There is no consent by the owner of the  
21 property to which this device was affixed. In fact, it  
22 was done, as Justice Scalia indicated, surreptitiously.

23 MR. DREEBEN: But there was no consent to  
24 the owner of the can once he acquired it to have it  
25 contain a foreign item installed by the government.

1 JUSTICE SCALIA: Well, that's too bad. That  
2 doesn't make it a trespass. I mean --

3 MR. DREEBEN: Well, this Court thought that  
4 it --

5 JUSTICE SCALIA: It may be a sneaky thing to  
6 do, but -- but every sneaky thing is not a trespass.

7 MR. DREEBEN: Well, this Court thought that  
8 it was a technical trespass in Karo and said that made  
9 no difference because the purpose of the Fourth  
10 Amendment is to protect privacy interests and meaningful  
11 interferences with possessory interests, not to cover  
12 all technical trespasses. And the case that I --

13 JUSTICE SCALIA: So we've narrowed the  
14 Fourth Amendment?

15 MR. DREEBEN: Well, I think the Court --

16 JUSTICE SCALIA: So the -- the privacy  
17 rationale doesn't expand it, but narrows it in some  
18 respects.

19 MR. DREEBEN: It changes it, Justice Scalia.  
20 And I think the case that most clearly illustrates the  
21 distinction between trespass and Fourth Amendment  
22 protection is *Oliver v. United States*, the case that  
23 reaffirmed the open fields doctrine. In that case,  
24 there was absolutely no doubt that the police committed  
25 a trespass under local law. They entered, they crossed



1 fences, they ignored big "no trespassing" signs; and  
2 this Court held that the interests that are protected by  
3 trespass law are distinct from the interests protected  
4 by the Fourth Amendment.

5 JUSTICE SCALIA: Undoubtedly, but the  
6 rationale of that case was that it was not an  
7 unreasonable --

8 MR. DREEBEN: No, the rationale was that --

9 JUSTICE SCALIA: -- it was not an  
10 unreasonable search.

11 MR. DREEBEN: -- there was no search,  
12 Justice Scalia. The rationale of that case was that  
13 open fields are not among the things that are protected  
14 by the Fourth Amendment. And the Court was very  
15 specifically focused on the distinction between trespass  
16 law and Fourth Amendment law.

17 CHIEF JUSTICE ROBERTS: You think there  
18 would also not be a search if you put a GPS device on  
19 all of our cars, monitored our movements for a month?  
20 You think you're entitled to do that under your theory?

21 MR. DREEBEN: The justices of this Court?

22 CHIEF JUSTICE ROBERTS: Yes.

23 (Laughter.)

24 MR. DREEBEN: Under our theory and under  
25 this Court's cases, the justices of this Court when

1 driving on public roadways have no greater expectation  
2 --

3 CHIEF JUSTICE ROBERTS: So your answer is  
4 yes, you could tomorrow decide that you put a GPS device  
5 on every one of our cars, follow us for a month; no  
6 problem under the Constitution?

7 MR. DREEBEN: Well, equally, Mr. Chief  
8 Justice, if the FBI wanted to it could put its team of  
9 surveillance agents around the clock on any individual  
10 and follow that individual's movements as they went  
11 around on the public streets and they would thereby  
12 gather --

13 JUSTICE ALITO: Well, that seems to get --  
14 to me to get to what's really involved here, the issue  
15 of whether there is a technical trespass or not is  
16 potentially a ground for deciding this particular case,  
17 but it seems to me the heart of the problem that's  
18 presented by this case and will be presented by other  
19 cases involving new technology is that in the  
20 pre-computer, pre-Internet age much of the privacy -- I  
21 would say most of the privacy -- that people enjoyed was  
22 not the result of legal protections or constitutional  
23 protections; it was the result simply of the difficulty  
24 of traveling around and gathering up information.

25 But with computers, it's now so simple to

1    amass an enormous amount of information about people  
2    that consists of things that could have been observed on  
3    the streets, information that was made available to the  
4    public.  If -- if this case is decided on the ground  
5    that there was a technical trespass, I don't have much  
6    doubt that in the near future it will be probable -- I  
7    think it's possible now in many instances -- for law  
8    enforcement to monitor people's movements on -- on  
9    public streets without committing a technical trespass.

10               So how do we deal with this?  Do we just  
11   say, well, nothing is changed, so that all the  
12   information that people expose to the public -- is, is  
13   fair game?  There is no -- there is no search or seizure  
14   when that is -- when that is obtained, because there  
15   isn't a reasonable expectation of privacy?  But isn't  
16   there a real change in -- in this regard?

17               MR. DREEBEN:  I don't think, Justice Alito,  
18   that there is a particularly dramatic change in this  
19   case from what went on in the Karo and the Knotts cases.

20               It is possible to envision broader advances  
21   in technology that would allow more public information  
22   to be amassed and put into computer systems.  But I  
23   think that the remedy for that, if this Court agrees  
24   with the principles in Knotts and Karo and applies them  
25   to this case, the remedy is through legislation, just as

1 when the Court held that amassing pen register data, all  
2 of the numbers that you dial on your telephone, the  
3 lengths of the times of the calls. The Court was  
4 confronted in that case with Justice Stewart's view in  
5 dissent --

6 JUSTICE GINSBURG: But it -- it is a third  
7 party involved in the telephone -- in the pen register  
8 case. And here, it's the police. Essentially, I think  
9 you answered the question that the government's position  
10 would mean that any of us could be monitored whenever we  
11 leave our -- our homes, so the only thing secure is the  
12 home. Is -- I mean, this is -- that is the end point of  
13 your argument, that an electronic device, as long as  
14 it's not used inside the house, is okay.

15 MR. DREEBEN: Well, we are talking here  
16 about monitoring somebody's movements in public. We are  
17 not talking about monitoring their conversations, their  
18 telephone calls, the interior of their cars, their  
19 private letters or packages. So there are enclaves of  
20 Fourth Amendment protection that this Court has  
21 recognized.

22 JUSTICE BREYER: But what -- but what is the  
23 question that I think people are driving at, at least as  
24 I understand it and certainly share the concern, is that  
25 if you win this case then there is nothing to prevent

1 the police or the government from monitoring 24 hours a  
2 day the public movement of every citizen of the United  
3 States. And -- and the difference between the  
4 monitoring and what happened in the past is memories are  
5 fallible, computers aren't.

6 And no one, at least very rarely, sends  
7 human beings to follow people 24 hours a day. That  
8 occasionally happens. But with the machines, you can.  
9 So if you win, you suddenly produce what sounds like  
10 1984 from their brief. I understand they have an  
11 interest in perhaps dramatizing that, but -- but maybe  
12 overly. But it still sounds like it.

13 And so what protection is there, if any,  
14 once we accept your view of the case, from this slight  
15 futuristic scenario that's just been painted, and is  
16 done more so in their briefs?

17 MR. DREEBEN: Justice Breyer, first of all,  
18 this is exactly the argument that was presented to the  
19 Court in Knotts. If you go back to 1983, the beeper  
20 technology in that case seemed extraordinarily advanced  
21 and there was a potential for it to be used. The --

22 JUSTICE BREYER: Of course, that's true.  
23 And they do have a limit. In this case, they say Knotts  
24 involved a single journey, or let's say it involved four  
25 journeys. And let's say it involved 4 journeys in

1 2 days. This involves every journey for a month, so  
2 they say whatever the line is that's going to protect  
3 us, it's short of every journey in a month.

4 So I'm not asking -- I'm saying I accept  
5 your point there, and what do you say is the limit?

6 MR. DREEBEN: I first want to address the  
7 suggestion that you could draw a line somewhere between  
8 a month and a trip and have a workable standard for  
9 police officers to use. Police officers use a variety  
10 of investigative techniques which in the aggregate  
11 produce an enormous amount of information. Pen  
12 registers, trash pulls; they look at financial records.  
13 They conduct visual surveillance. And under a principle  
14 of law that says 1 trip is okay but 30 trips in not,  
15 there is absolutely no guidance for law enforcement in  
16 how they are --

17 JUSTICE BREYER: Well, there is the same  
18 kind of guidance that you have in any case of this Court  
19 that uses the technique which is used sometimes, and I  
20 think it's used for example in the bribing the judge  
21 case, you know, with campaign contributions. You draw  
22 an outer limit, you say you can't go beyond that. We  
23 know within that there is no standard. We'll leave it  
24 for the lower courts to work out and we'll review it  
25 over time.

1           That's not necessarily desirable, but that  
2   is a method this Court has sometimes used. But even if  
3   it's wrong, I want to know, are you saying there is no  
4   limit or are you suggesting one?

5           MR. DREEBEN: I'm suggesting that the Court  
6   do the same thing that it did in Knotts. This case does  
7   not involve 24-hour surveillance of every citizen of the  
8   United States. It involves following one suspected drug  
9   dealer as to whom there was very strong suspicion, for a  
10   period of time that actually is less than a month,  
11   because the beeper technology failed during --

12          CHIEF JUSTICE ROBERTS: Well, then you're --  
13   you're moving away from your argument. Your argument  
14   is, it doesn't depend how much suspicion you have, it  
15   doesn't depend on how urgent it is. Your argument is  
16   you can do it, period. You don't have to give any  
17   reason. It doesn't have to be limited in any way,  
18   right?

19          MR. DREEBEN: That is correct, Mr. Chief  
20   Justice.

21          CHIEF JUSTICE ROBERTS: Well, isn't the  
22   normal way in these situations that we draw these limits  
23   how intrusive the search can be, how long it can be, is  
24   by having a magistrate spell it out in a warrant?

25          MR. DREEBEN: When you're talking about the

1 movements of a car on a public roadway, which even  
2 Justice Breyer's question seems to concede could be  
3 monitored for a day or perhaps 4 days, there is no  
4 Fourth Amendment search -- unless --

5 CHIEF JUSTICE ROBERTS: Well, you're talking  
6 about the difference between seeing the little tile and  
7 seeing a mosaic. The one gives you information, the  
8 other doesn't.

9 MR. DREEBEN: So does a pen register, so  
10 does a garbage pull. So does looking at everybody's  
11 credit card statement for a month. All of those things  
12 this Court has held are not searches. And that --

13 JUSTICE GINSBURG: Mr. Dreeben, this case  
14 started out with a warrant. There was a warrant and the  
15 limits weren't followed. The warrant said 10 days, do  
16 this in 10 days, and the police took 11. They were  
17 supposed to do it in D.C. Instead, they did it in  
18 Maryland.

19 So the police could have gotten permission  
20 to conduct this search. In fact, they had received it.  
21 Now, I take it that the practice had been, because it's  
22 in the electronic surveillance manual, that you better  
23 get a warrant. Was there any problem about when this  
24 kind of surveillance is wanted by the government, get a  
25 warrant? Were they encountering difficulty getting



1 warrants?

2 MR. DREEBEN: In this case, there would not  
3 have been any difficulty getting a warrant, Justice  
4 Ginsburg. And the warrant authorized things beyond just  
5 monitoring the car. It authorized entering the car in  
6 order to install it, which wasn't necessary here. It  
7 also authorized monitoring the car in a location where  
8 there was a reasonable expectation of privacy. This  
9 case is only about monitoring a car on public streets.

10 But I think it's very important to keep in  
11 mind that the -- the principal use of this kind of  
12 surveillance is when the police have not yet acquired  
13 probable cause, but have a situation that does call for  
14 monitoring. And I'd like to give an example.

15 If the police get an anonymous phone call  
16 that a bomb threat is going to be carried out at a  
17 mosque by people who work at a small company, the bomb  
18 threat on an anonymous call will not provide even  
19 reasonable suspicion under this Court's decision in  
20 Florida v. J.L.

21 But you can hardly expect the FBI to ignore  
22 a credible, detailed-sounding piece of information like  
23 that. Now, the --

24 CHIEF JUSTICE ROBERTS: If you get an  
25 anonymous tip that there is the same bomb in somebody's

1 house, do you get a warrant or do -- do you just go in?

2 MR. DREEBEN: You do neither, because  
3 without probable cause you cannot enter the house.

4 CHIEF JUSTICE ROBERTS: Then why are you  
5 asking for a different rule in this situation?

6 MR. DREEBEN: Because the -- the police in  
7 this situation have the traditional means available to  
8 investigate these sorts of tips. They could put teams  
9 of agents on all the individuals who are within the pool  
10 of suspicion and follow them 24/7. And that would raise  
11 --

12 JUSTICE SOTOMAYOR: You're -- you're now  
13 suggesting an answer to Justice Kennedy's question, which  
14 is it would be okay to take this computer chip, put it  
15 on somebody's overcoat and follow every citizen  
16 everywhere they go indefinitely. So -- under your  
17 theory, and the theory espoused in your brief, you could  
18 monitor and track every person through their cell phone,  
19 because today the smartphones emit signals that police  
20 can pick up and use to follow someone anywhere they go.

21 Your theory is so long as the -- that all --  
22 that what is being monitored is the movement of person,  
23 of a person, they have no reasonable expectation that  
24 their possessions will not be used by you. That's  
25 really the bottom line --

1 MR. DREEBEN: I think that --

2 JUSTICE SOTOMAYOR: -- to track them, to  
3 invade their sense of integrity in their choices about  
4 who they want to see or use their things. That's really  
5 argument you're making.

6 MR. DREEBEN: Well, Justice Sotomayor, I  
7 think that that goes considerably farther than our  
8 position in this case, because our position is not that  
9 the Court should overrule United States v. Karo and  
10 permit monitoring within a private residence. That is  
11 off limits absent a warrant or exigent circumstances  
12 plus probable cause. And monitoring an individual  
13 through their clothing poses an extremely high  
14 likelihood that they will enter a place where they have  
15 a reasonable expectation of privacy.

16 JUSTICE SOTOMAYOR: Cars get parked in a  
17 garages. It happened here.

18 MR. DREEBEN: Yes, but a car that's parked  
19 in a garage does not have a reasonable expectation of  
20 privacy as to its location. Anyone can observe --

21 JUSTICE SOTOMAYOR: Neither does a person.  
22 A person goes home and their overcoat gets hung on a  
23 hanger. What's the difference?

24 MR. DREEBEN: Once the -- once the effect is  
25 in the house, under Karo there is an expectation of

1 privacy that cannot be breached without a warrant, and  
2 we are not asking the Court to overrule that.

3 JUSTICE SOTOMAYOR: Tell me what the  
4 difference between this and a general warrant is? I  
5 mean --

6 MR. DREEBEN: A general warrant --

7 JUSTICE SOTOMAYOR: -- what motivated the  
8 Fourth Amendment historically was the disapproval, the  
9 outrage, that our Founding Fathers experienced with  
10 general warrants that permitted police indiscriminately  
11 to investigate just on the basis of suspicion, not  
12 probable cause and to invade every possession that the  
13 individual had in search of a crime. How is this  
14 different --

15 MR. DREEBEN: A warrant authorizes --

16 JUSTICE SOTOMAYOR: -- this kind of  
17 surveillance where there is no probable cause, there is  
18 not even necessarily reasonable suspicion in --

19 MR. DREEBEN: A warrant authorizes a search.  
20 This authorizes the ability to track somebody's  
21 movements in a car on a public roadway, a subject as to  
22 which this Court said in *Knotts* that no individual has a  
23 reasonable expectation of privacy because when they go  
24 out in their car their car is traveling on public roads.  
25 Anyone can look. The police have no obligation to avert

1 their eyes from anything that any member of the public

2 --

3 CHIEF JUSTICE ROBERTS: What if we -- I give  
4 you that, that it's in public. Does the reasonable  
5 expectation of privacy trump that fact? In other words,  
6 if we ask people, do you think it's -- it violates your  
7 right to privacy to have this kind of information  
8 acquired, and everybody says yes, is it a response that,  
9 no, that takes place in public, or it simply the  
10 reasonable expectation of privacy regardless of the fact  
11 that it takes place in public?

12 MR. DREEBEN: Well, something that takes  
13 place in public isn't inherently off-limits to a  
14 reasonable expectation of privacy. That's essentially  
15 the holding of Katz. You go into a phone booth, you're  
16 in a public; making your calls within the phone booth is  
17 subject to a reasonable expectation of privacy.

18 But this Court, with full awareness of that  
19 holding, in Knotts and in Karo recognized that  
20 surveillance of a vehicle traveling on the public  
21 roadways doesn't fit that description.

22 CHIEF JUSTICE ROBERTS: You can see, though,  
23 can't you, that 30 years ago if you asked people does it  
24 violate your privacy to be followed by a beeper, the  
25 police following you, you might get one answer, while

1     today if you ask people does it violate your right to  
2     privacy to know that the police can have a record of  
3     every movement you made in the past month, they might  
4     see that differently?

5             MR. DREEBEN:   They probably would also feel  
6     differently about being followed 24/7 by a team of FBI  
7     agents, who gain far more information than a GPS device  
8     produces.   GPS only gives you the approximate location  
9     of the car as it drives on the roads.

10            JUSTICE GINSBURG:   And speed as well.

11            MR. DREEBEN:   The approximate speed, the  
12     location traveled, that -- that is what the GPS  
13     provides.   It doesn't show you where the car stopped.  
14     It doesn't show you who was driving the car.   It doesn't  
15     show you who was --

16            JUSTICE GINSBURG:   An easy way, to pick  
17     someone up for speeding when you suspect something far  
18     worse but have no probable cause.

19            MR. DREEBEN:   Well, this Court held in *Whren*  
20     *v. United States* that when the police have probable  
21     cause to stop someone for a traffic violation they can  
22     do that.   There are protections --

23            JUSTICE GINSBURG:   That was when the police  
24     came upon the violator.   But this is, it's all in the  
25     computer.   The police can say, we want to find out more

1 about X, so consult the database, see if there is an  
2 indication that he was ever speeding in the last 28  
3 days.

4 MR. DREEBEN: Justice Ginsburg, it's not  
5 very hard for police to follow somebody and find a  
6 traffic violation if they want to do that. But to  
7 answer in part Justice Breyer's earlier concern about  
8 limiting principles, this Court recognized in the Whren  
9 decision that, although the Fourth Amendment is not a  
10 restriction on discriminatory or arbitrary or oppressive  
11 stops that are based on invidious characteristics, the  
12 Equal Protection Clause is. The First Amendment also  
13 stands as a protection. If this Court believes that  
14 there is an excessive chill created by an actual law or  
15 universal practice of monitoring people through GPS,  
16 there are other constitutional principles that are  
17 available.

18 JUSTICE GINSBURG: But the Fourth Amendment  
19 protects us against unreasonable searches and seizures.  
20 And if I were to try to explain to someone, here is the  
21 Fourth Amendment, the Fourth Amendment says -- or it has  
22 been interpreted to mean that if I'm on a public bus and  
23 the police want to feel my luggage, that's a violation,  
24 and yet this kind of monitoring, installing the GPS and  
25 monitoring the person's movement whenever they are

1 outside their house in the car is not? It just -- there  
2 is something about it that, that just doesn't parse.

3 MR. DREEBEN: I'm quite sure, Justice  
4 Ginsburg, that if you ask citizens whether the police  
5 could freely pick up their trash for a month and paw  
6 through it looking for evidence of a crime, or keep a  
7 record of every telephone call that they made for the  
8 duration and the number that it went through, or conduct  
9 intense visual surveillance of them, that citizens would  
10 probably also find that to be, in the word that  
11 Respondents choose to use --

12 JUSTICE BREYER: But they won't and probably  
13 couldn't physically.

14 Start with the other end. Start, what would  
15 a democratic society look like if a large number of  
16 people did think that the government was tracking their  
17 every movement over long periods of time. And once you  
18 reject that, you have to have a reason under the Fourth  
19 Amendment and a principle. And what I'm looking for is  
20 the reason and the principle that would reject that, but  
21 wouldn't also reject 24 hours a day for 28 days. Do you  
22 see where I'm -- that's what I'm listening very hard to  
23 find.

24 MR. DREEBEN: I think -- all right. Justice  
25 Breyer, two things on that. First of all, I think the



1 line-drawing problems that the Court would create for  
2 itself would be intolerable, and better that the Court  
3 should address the so-called 1984 scenarios if they come  
4 to pass rather than using this case as a vehicle for  
5 doing so.

6 Second, if the Court --

7 JUSTICE SOTOMAYOR: This case is not that  
8 vehicle.

9 MR. DREEBEN: If the Court --

10 JUSTICE SOTOMAYOR: The GPS technology today  
11 is limited only by the cost of the instrument, which  
12 frankly right now is so small that it wouldn't take that  
13 much of a budget, local budget, to place a GPS on every  
14 car in the nation.

15 MR. DREEBEN: Well I think that --

16 JUSTICE SOTOMAYOR: Almost every car has it  
17 now.

18 MR. DREEBEN: Well, I think it would be  
19 virtually impossible to use the kinds of tracking  
20 devices that were used in this case on everyone,  
21 because --

22 JUSTICE SCALIA: Don't we have any  
23 legislatures out there that could stop this stuff?

24 MR. DREEBEN: Justice Scalia, the  
25 legislature is a safeguard, and if the Court believes

1     that there needs to be a Fourth Amendment safeguard as  
2     well, we have urged as a fallback position that the  
3     Court adopt a reasonable suspicion standard, which would  
4     allow the police to conduct surveillance of individuals  
5     in their movements on public roadways, which they can do  
6     visually in any event, and would allow the police to  
7     investigate leads and tips that arise under  
8     circumstances where there is not probable cause.

9                 JUSTICE GINSBURG:   Who would be under your  
10    test the judge of the reasonable suspicion?

11                MR. DREEBEN:   As in most reasonable  
12    suspicion cases, it's the police at the front end and  
13    it's the courts at the back end if there are motions to  
14    suppress evidence.   But fundamentally, just as in the  
15    pen register example and in the financial records  
16    example, if this Court concludes, consistent with its  
17    earlier cases, that this is not a search yet all  
18    Americans find it to be an omen of 1984, Congress would  
19    stand ready to provide appropriate protection.

20                If I may save the rest of my time for  
21    rebuttal.

22                CHIEF JUSTICE ROBERTS:   Thank you.   Our  
23    questions have eaten into your rebuttal time, so we'll  
24    give you the full time.

25                Mr. Leckar.

1 ORAL ARGUMENT OF STEPHEN C. LECKAR

2 ON BEHALF OF THE RESPONDENT

3 MR. LECKAR: Thank you, Mr. Chief Justice,  
4 and may it please the Court:

5 I want to talk about the one issue that the  
6 United States didn't talk about, which is whether this  
7 is a seizure. This case can be resolved on a very  
8 narrow basis, a very narrow basis: What are the  
9 consequences when the police without a warrant install a  
10 GPS secretly on a car of any citizen of the United  
11 States and they want to use the evidence gained that way  
12 in a criminal trial? Our position is that's a seizure.

13 JUSTICE ALITO: What is the size of this  
14 device?

15 MR. LECKAR: I'm sorry, Your Honor?

16 JUSTICE ALITO: What is the size of this  
17 device?

18 MR. LECKAR: The record doesn't show in this  
19 case, but we know -- we learned last week, Justice  
20 Alito, from the NACDL that there is now a GPS on the  
21 market that weighs 2 ounces and is the size of a credit  
22 card. Think how easy it would be for any law  
23 enforcement agent of the 880,000 in the United States to  
24 stick one of those on anybody's vehicle.

25 JUSTICE ALITO: What if it was put on the

1 license place. Would that be a technical trespass? Is  
2 that the property of the driver?

3 MR. LECKAR: Well, a license plate as I  
4 understand it is the property of the State and driving  
5 is a privilege. But it's not a technical trespass in  
6 this particular case. Mr. Jones has a right --

7 JUSTICE SCALIA: I didn't own my license  
8 plate? I didn't know that. How do you know that?

9 (Laughter.)

10 JUSTICE SCALIA: How do you know that? I  
11 paid for my license plate.

12 JUSTICE KENNEDY: We don't need to get into  
13 it, but "Live Free Or Die" --

14 MR. LECKAR: What I'm saying, Justice  
15 Kennedy and Justice Scalia, is this: That the issue  
16 insofar as the seizure is concerned is, is it  
17 meaningful. Everybody agrees here that there is -- that  
18 Antoine Jones had the right to control the use of his  
19 vehicle. The question is, was the interference a  
20 meaningful deprivation of his possessory interest.

21 CHIEF JUSTICE ROBERTS: I didn't -- I  
22 didn't hear an answer to Justice Alito's question. What  
23 is your position on the placement of the GPS device on  
24 the State-owned license plate.

25 MR. LECKAR: They can't do it. They can't

1 do it, Your Honor. It's a seizure.

2 CHIEF JUSTICE ROBERTS: It's a --

3 MR. LECKAR: I'm sorry.

4 CHIEF JUSTICE ROBERTS: If my understanding  
5 is correct that it's the State's license plate that they  
6 require you to have, so your trespass theory it would  
7 seem falls apart with respect to that particular  
8 scenario.

9 MR. LECKAR: Well, first of all, Justice --  
10 Chief Justice Roberts, my -- you would probably see the  
11 GPS and in that case --

12 CHIEF JUSTICE ROBERTS: No. It's the size  
13 of a credit card. You slip it behind the license plate.

14 MR. LECKAR: In that particular case, what  
15 you have done is you have -- the installation of the  
16 GPS, it is a seizure. What makes it meaningful is the  
17 use of that GPS.

18 JUSTICE SCALIA: Well, this is ridiculous.  
19 Look at -- you give the State permission to put the  
20 license plate -- to carry -- to have your car carry the  
21 State's license plate. You do not give anybody  
22 permission to have your car carry a tracking device.

23 MR. LECKAR: That's correct.

24 JUSTICE SCALIA: And whether it's put  
25 directly on the car or directly on something that the

1 car is carrying doesn't seem to me to make any  
2 difference.

3 CHIEF JUSTICE ROBERTS: I thought it made a  
4 difference under your theory, which focused on the  
5 question of trespass, because it was attached to an  
6 effect owned by somebody else. This is an effect not  
7 owned by the individual.

8 MR. LECKAR: That's correct.

9 CHIEF JUSTICE ROBERTS: So the trespass  
10 theory anyway doesn't seem ridiculous to me.

11 MR. LECKAR: But it's an effect, Your Honor.  
12 The Fourth Amendment protects effects, it protects  
13 people. If you put it on somebody's briefcase, you put  
14 it on somebody's car, you have affected their possessory  
15 interest. Then the question becomes --

16 JUSTICE KAGAN: Mr. Leckar, I guess I'm not  
17 sure I quite understand the argument, because a trespass  
18 is accomplished no matter what you put on somebody's car  
19 or somebody's overcoat or what have you. You could put  
20 a nonworking device on somebody's car and it would still  
21 be a trespass. But surely the same constitutional  
22 problem is not raised. So how do you get from the  
23 trespass to the constitutional problem.

24 MR. LECKAR: As I -- thank you, Justice  
25 Kagan. As I said moments ago, what makes it meaningful,

1     what makes it a meaningful deprivation of a possessory  
2     interest, is once the GPS gets activated. We look at  
3     reality. We follow what Silverman v --

4                 JUSTICE SCALIA: So it doesn't make it a  
5     seizure. That doesn't make it a seizure. It makes it a  
6     search.

7                 MR. LECKAR: Your Honor --

8                 JUSTICE SCALIA: I mean, you can say that  
9     there is a trespass for the purpose of obtaining  
10    information, which makes it a search. But I don't see  
11    how it's a seizure. A seizure, you have to bring  
12    something within your control. You have to stop the  
13    person or stop the vehicle. What has been seized when  
14    you -- when you slap a tracking device on a car?

15                MR. LECKAR: What has been seized is  
16    Antoine's -- data. Data is seized that is created by  
17    the GPS. Antoine Jones has the right, Your Honor, to  
18    control the use of his vehicle. And what the government  
19    did was surreptitiously deprive him of the use of that  
20    --

21                JUSTICE SCALIA: Do you have any case  
22    involving seizure of -- of data floating in the air as  
23    opposed to papers?

24                MR. LECKAR: The closest case I could come,  
25    Your Honor, would be Silverman, where the Court called a

1 Fourth Amendment violation where the spike mike just  
2 touched -- touched the ventilator unit.

3 JUSTICE BREYER: It's not a violation  
4 unless, in addition to a search, it is an unreasonable  
5 search. And since you already -- and the same is true  
6 of seizure, isn't it?

7 MR. LECKAR: That's right.

8 JUSTICE BREYER: So you already have  
9 everybody agrees it's at least a search. So what do you  
10 care whether the -- and there is a case called Karo  
11 which says whether it's a trespass doesn't really  
12 matter. The question is the reasonableness of it. And  
13 that's what I think -- I mean you can argue trespass as  
14 much as you want, but I'll still have in mind is it  
15 reasonable.

16 MR. LECKAR: That's right.

17 JUSTICE BREYER: And I think that's the  
18 question we've been debating. And I would like to know  
19 from you -- what they are saying is that the parade of  
20 horrors we can worry with -- worry about when it comes  
21 up, the police have many, many people that they suspect  
22 of all kinds of things ranging from kidnappings of lost  
23 children to terrorism to all kinds of crimes.

24 They're willing to go as far as reasonable  
25 suspicion in a pinch. And they say at least with that



1     you will avoid the 1984 scenario and you will in fact  
2     allow the police to do their work with doing no more  
3     than subjecting the person to really good knowledge of  
4     where he is going on the open highway. They probably  
5     put it better than I did, but I'd appreciate your views  
6     on that.

7                   MR. LECKAR: Reasonable suspicion, Justice  
8     Breyer, is something that the Court has adopted for  
9     limited intrusions. And I refer you to the United  
10    States v. Place. Every 10 seconds of the day for 28  
11    days is by no person's lights a limited intrusion. That  
12    said, what happened -- what happened here -- society  
13    does not view as reasonable the concept that the United  
14    States Government has the right to take a device that  
15    enables them to engage in pervasive, limitless,  
16    cost-free -- cost-free surveillance, that completely  
17    replaces the human equation --

18                   CHIEF JUSTICE ROBERTS: How do you know  
19    that?

20                   JUSTICE KENNEDY: Why does it have to be  
21    cost-free. Suppose the police department says: We've  
22    got two things. We can put 30 deputies on this route  
23    and watch this person or we can have a device with a  
24    warrant. What difference does it make?

25                   MR. LECKAR: What happens is the police have

1 the capacity with GPS to engage in grave abuse, grave  
2 abuse of individual and group liberties, Your Honor.

3 JUSTICE KENNEDY: But suppose what they got  
4 is nothing more than what they would have had if they  
5 had 30 deputies staked out along the route. That's all.  
6 They'd get the same from 30 deputies. A constitutional  
7 violation?

8 MR. LECKAR: Yes, if they use a GPS, Your  
9 Honor. Any placement of a GPS on anybody's car --

10 JUSTICE KENNEDY: Well, no. We are assuming  
11 that there is no initial trespass, which is a problem in  
12 this case. You're saying it's -- it's the quantity  
13 and -- of the information seized and the time over which  
14 it's seized. And that's the proposition we are testing.  
15 And it seems to me what you're saying is that the police  
16 have to use the most inefficient methods.

17 MR. LECKAR: No, Your Honor. I'm not  
18 asking --

19 JUSTICE KENNEDY: I'm fully aware of the  
20 1984 ministry of love, ministry of -- of peace problem.  
21 But this -- your argument it seems to me has no  
22 principled distinction from the case that I put.

23 MR. LECKAR: I think I can help you with  
24 that. We are not asking to make the police less  
25 efficient than they were before GPS came into effect.

1 We are simply saying that the use of a GPS has grave  
2 potential, grave threats of abuse to privacy; that  
3 people have an expectation, Justice Kennedy, that their  
4 neighbor is not going to use their car to track them.  
5 People have an -- under Rakas -- I refer the Court to  
6 footnote 12 in the Rakas case. Antoine Jones had  
7 control of that car. Control of that -- of the vehicle  
8 meant that he had a reasonable expectation that society  
9 is prepared to view as objectively reasonable. The  
10 government --

11 JUSTICE GINSBURG: But he wouldn't -- he  
12 wouldn't be protected against a surveillance camera that  
13 could get information, and is this really different in  
14 kind from the surveillance camera?

15 MR. LECKAR: Yes. First of all, you have a  
16 physical invasion. That's Bond v. United States. You  
17 have an invasion of his possessory interest, placement  
18 on the car. Physical invasion of a possessory interest,  
19 Justice Ginsburg, is more significant, has always been  
20 viewed by this Court as more invasive than mere video --  
21 mere visual surveillance.

22 And even with a camera, it depends on the  
23 type of the video camera. We are not saying that the  
24 police are prohibited from having individual video  
25 cameras or several video cameras to surveil people.

1     What we are saying here is this device, this device that  
2     enables limitless, pervasive, indiscriminate --

3                 JUSTICE KAGAN:   What is the difference  
4     really?   I'm told -- maybe this is wrong, but I'm told  
5     that if somebody goes to London, almost every place that  
6     person goes there is a camera taking pictures, so that  
7     the police can put together snapshots of where everybody  
8     is all the time.   So why is this different from that.

9                 MR. LECKAR:   It's pretty scary.   I wouldn't  
10    want to live in London under those circumstances.

11                JUSTICE SCALIA:   Well, it must be  
12    unconstitutional if it's scary.

13                         (Laughter.)

14                JUSTICE SCALIA:   I mean, what is it, the  
15    scary provision of what article?

16                JUSTICE BREYER:   And in fact, those cameras  
17    in London actually enabled them, if you watched them, I  
18    got the impression, to track the bomber who was going to  
19    blow up the airport in Glasgow and to stop him before he  
20    did.   So there are many people who will say that that  
21    kind of surveillance is worthwhile, and there are others  
22    like you who will say, no, that's a bad thing.   But that  
23    isn't the issue exactly in front of us.

24                MR. LECKAR:   That's correct, Your Honor.  
25    What we have here is a physical --

1 JUSTICE BREYER: And what Justice Kagan  
2 wanted to know is why not.

3 MR. LECKAR: Because you have a physical  
4 invasion of property.

5 JUSTICE BREYER: Oh, my goodness. Sorry, I  
6 just had that expression because I'm reading. "The  
7 existence of a physical trespass is only marginally  
8 relevant to the question of whether the Fourth Amendment  
9 has been violated, however, for an actual trespass is  
10 neither necessary nor sufficient to establish a  
11 constitutional violation." That's Karo.

12 So you can talk if you'd like. It's your  
13 hour. But I would really be very interested in hearing  
14 you on the assumption that the real issue here is  
15 whether this is reasonable.

16 MR. LECKAR: It's not, Your Honor. This is  
17 not a Karo case. First of all, in Karo the installation  
18 was essentially consented to. You took -- the package  
19 came in by virtue of somebody who was working for the  
20 government. So the installation was not unlike this  
21 case -- was unlike this case, where it was surreptitious  
22 and directly engaged in by a government agent.

23 JUSTICE KENNEDY: But you're -- you're  
24 mixing, you're mixing two things. You're the one -- I  
25 thought your position was that the initial trespass is

1 not important. That's the narrow way to decide the  
2 issue. You don't want us to do that. So now we ask you  
3 about Karo and you say: Oh, well, there was a trespass.  
4 So that's -- that's not -- that's not a responsive  
5 answer.

6 MR. LECKAR: Well, but technology, as you  
7 observed, Justice Kennedy, is dramatically different  
8 with GPS than was present in Karo.

9 JUSTICE SOTOMAYOR: But it's going to be  
10 dramatically different in the next step. There are now  
11 satellites that look down and can hone in on your home  
12 on a block and in a neighborhood. I don't see that far  
13 in the future when those cameras are going to be able to  
14 show you the entire world and let you track somebody on  
15 the camera from place to place.

16 MR. LECKAR: Well --

17 JUSTICE SOTOMAYOR: So if -- give us a  
18 theory. Is that okay for the police to access those  
19 cameras and look at you moving from place to place? And  
20 if that's okay, then why is this not okay? What is your  
21 theory of your case?

22 MR. LECKAR: Our theory, Justice Sotomayor,  
23 with respect to video camera, if they are targeting an  
24 individual, this presents a gray question. It's a  
25 question that need not be resolved given this case. But

1 if the Court wanted to address that question, once the  
2 police target somebody, they want to engage in  
3 individualized targeting for use of a pervasive network  
4 of cameras -- and GPS is like a million cameras. That's  
5 -- the New York Court of Appeals pointed that out, and  
6 this --

7 JUSTICE SOTOMAYOR: I think there are about  
8 28 satellites up there.

9 MR. LECKAR: All right. It's 28 cameras,  
10 but the equivalent of a camera tracking you every street  
11 corner you're on everywhere. Once you have  
12 individualized suspicion like that, if the Court wanted  
13 to deal with it, I believe you would have to have a  
14 warrant.

15 JUSTICE SCALIA: Mr. Leckar, your -- all of  
16 this discussion, you're going into it, but the  
17 questioning leads you into it, it seems to me leaps over  
18 the difficult part of your case. The issue before us is  
19 not -- not in the abstract whether this police conduct  
20 is unreasonable. The unreasonableness requirement or  
21 the unreasonableness prohibition does not take effect  
22 unless there has been a search. And our cases have said  
23 that there is no search when -- when you are in public  
24 and where everything that you do is open to -- to the  
25 view of people. That's the hard question in the case,

1 not whether this is unreasonable. That's not what the  
2 Fourth Amendment says, the police can't do anything  
3 that's unreasonable. They can do a lot of stuff that's  
4 unreasonable without violating the Fourth Amendment and  
5 that -- the protection against that is the legislature.

6 But you have to establish, if you're going  
7 to go with Katz, that there has been an invasion of, of  
8 privacy when all that -- all that this is showing is  
9 where the car is going on the public streets, where the  
10 police could have had round-the-clock surveillance on  
11 this individual for a whole month or for 2 months or for  
12 3 months, and that would not have violated anything,  
13 would it?

14 MR. LECKAR: No.

15 JUSTICE SCALIA: Why? Because there is no  
16 invasion of privacy. So why is this an invasion of  
17 privacy?

18 MR. LECKAR: Because it is -- it is a  
19 complete robotic substitute. It's not a -- it's not a  
20 tail. And interestingly enough, Your Honor. The  
21 government only cited in its brief one instance of a  
22 24-hour surveillance for all of 2 days. What you have  
23 here, Justice Scalia, is -- I'm going to refer to your  
24 dissent.

25 JUSTICE SCALIA: 100 times zero equals zero.



1 If -- if there is no invasion of privacy for 1 day,  
2 there is no invasion of privacy for 100 hundred days.  
3 Now, it may be unreasonable police conduct, and we can  
4 handle that with laws. But if there is no invasion of  
5 privacy, no matter how many days you do it, there is no  
6 invasion of privacy.

7 MR. LECKAR: Justice Scalia, what -- I'm  
8 going to refer to your dissent along with Justice Breyer  
9 in *Bond v. United States*. A GPS in your car is, or  
10 anybody's car, is like -- without a warrant, is like  
11 having an -- it makes you unable to get rid of an  
12 uninvited stranger. That's what it is. Now what --

13 JUSTICE SCALIA: So is a tail. So is a tail  
14 when the police surveil -- surveil you for, for a month.

15 MR. LECKAR: The question we have to answer  
16 in this case, Justice Scalia, is this. A tail -- if  
17 they can -- if they want to tail, if they want to commit  
18 the resources, that's fine. But what a GPS does, it  
19 involves -- it allows the government to engage in  
20 unlimited surveillance through a machine, through a  
21 machine robotically. Nobody is even involved monitoring  
22 it. The record in this case showed that many times the  
23 police officers just let -- let the machine go on.

24 JUSTICE ALITO: Well, where would you draw  
25 the line? Suppose that the GPS was used only to track

1     somebody's movements for one day or for 12 hours or for  
2     3 hours. Would that be all right?

3                   MR. LECKAR: Our position, Justice Alito,  
4     is, no circumstances should a GPS be allowed to be put  
5     on somebody's car. But we recognize --

6                   JUSTICE ALITO: Put aside -- put aside the  
7     trespass question.

8                   MR. LECKAR: I'm not addressing it purely as  
9     a trespass. Our view is the GP -- the use of a GPS as a  
10    search in and of itself should be, is -- should be  
11    viewed as unreasonable. But if the Court were  
12    uncomfortable with that, if the Court had concerns with  
13    that, we suggested in our brief some possibilities: One  
14    day; one trip; one person per day or a trip; or perhaps  
15    when you use it exactly as a beeper, when you follow it,  
16    when you actually physically follow it.

17                   JUSTICE ALITO: Well, that sounds like a  
18    legislative line. But what is the difference between  
19    following somebody for 12 hours, let's say, and  
20    monitoring their movements on a GPS for 12 hours? You  
21    would say that the latter -- your first argument is,  
22    there is a problem with the latter but not with the  
23    former. But what would the reason for that be?

24                   MR. LECKAR: Because it's an unreasonable  
25    invasion of privacy, Your Honor.

1 JUSTICE ALITO: What -- what is the  
2 difference in terms of one's privacy whether you're  
3 followed by a police officer for 12 hours and you don't  
4 see the officer or whether you're monitored by GPS for  
5 12 hours?

6 MR. LECKAR: Because -- because what you  
7 have here is society does not expect that the police,  
8 the human element would be taken out of -- would be  
9 taken out of the surveillance factor.

10 JUSTICE ALITO: You know, I don't know what  
11 society expects and I think it's changing. Technology  
12 is changing people's expectations of privacy.

13 Suppose we look forward 10 years, and maybe  
14 10 years from now 90 percent of the population will be  
15 using social networking sites and they will have on  
16 average 500 friends and they will have allowed their  
17 friends to monitor their location 24 hours a day, 365  
18 days a year, through the use of their cell phones. Then  
19 -- what would the expectation of privacy be then?

20 MR. LECKAR: Well, the use of a cell phone,  
21 there are two ways of looking at it. As Justice Kennedy  
22 observed in Quon, cell phones are becoming so  
23 ubiquitous, there may be privacy interests.

24 Our view is that currently the use of a cell  
25 phone, that's a voluntary act. People nowadays

1 understand that there are ways to monitor by way of a  
2 cell phone.

3 But I started my oral argument with this  
4 basic precept, Justice Alito. This case does not  
5 require us to decide those issues of emerging  
6 technology. It's a simple case at the core: Should the  
7 police be allowed surreptitiously to put these machines  
8 on people's cars and either -- call it a seizure, call  
9 it a search, call it a search and seizure, in the words  
10 of Katz, or call it a Fourth Amendment violation.

11 JUSTICE ALITO: Well, that -- maybe that's a  
12 good way to decide the case. But I just wonder, would  
13 Mr. Jones or anybody else be really upset if they found  
14 that the police had sneaked up to their car and put an  
15 inert device the size of their credit card on the  
16 underside of the car? What would they say about that,  
17 other than the fact that the police are wasting money  
18 doing this?

19 MR. LECKAR: If it were nothing more than a  
20 note, say, or even a bumper sticker like you get at  
21 South of the Border, probably nothing.

22 JUSTICE ALITO: You don't even see it. It's  
23 just a little wafer, they put it under the car, it does  
24 nothing.

25 MR. LECKAR: It's a little wafer that's got

1 an enormous capacity.

2 JUSTICE ALITO: But this one does nothing,  
3 and you -- so you would go -- you would sue -- you would  
4 bring a trespass action.

5 MR. LECKAR: No, heavens, no, Your Honor.  
6 If it did nothing, first, it wouldn't be a Fourth  
7 Amendment problem.

8 JUSTICE ALITO: So what's you're concerned  
9 about is not this little thing that's put on your car.  
10 It's not this invasion of your property interest. It's  
11 the monitoring that takes place.

12 MR. LECKAR: The monitoring makes it  
13 meaningful. Putting it on enables them to --

14 JUSTICE KAGAN: But to ask Justice Alito's  
15 question in a different way, suppose that the police  
16 could do this without ever committing the trespass.  
17 Suppose that in the future all cars are going to have  
18 GPS tracking systems and the police could essentially  
19 hack into such a system without committing the trespass.  
20 Would the constitutional issue we face be any different?

21 MR. LECKAR: As I assume, that's because of  
22 manufacturers doing it, or because Congress has  
23 legislated it, Justice Kagan? Under either  
24 circumstance, people would know. They would know that  
25 their privacy rights have been taken away. Whether that

1 would be possible to go through Congress, I seriously  
2 doubt, but people would know.

3 In this particular case, Antoine Jones had  
4 no idea whatsoever that his possessory interest in that  
5 property was about to be deprived by the government in a  
6 meaningful way to allow them to get information they  
7 couldn't have otherwise have gotten.

8 Justice Alito, what happens here, GPS  
9 produces unique data. When you and I drive down the  
10 street, we don't emit GPS data. What makes GPS data  
11 meaningful is the act -- is the use and placement of the  
12 GPS device, that was in this case, in this case,  
13 unconsented to by Antoine Jones unknowingly. And the  
14 government knew that. That's why they went and did it  
15 surreptitiously, because they couldn't get it any other  
16 way.

17 JUSTICE KENNEDY: Lots of communities have,  
18 including Washington, cameras on -- at intersections on  
19 stop lights. Suppose the police suspected someone of  
20 criminal activity and they had a computer capacity to  
21 take pictures of all the intersections that he drove  
22 through at different times of day, and they checked his  
23 movements and his routes for 5 days. Would that be  
24 lawful?

25 MR. LECKAR: I think that would be

1 allowable, Your Honor. I don't think --

2 JUSTICE KENNEDY: You think it would be?

3 MR. LECKAR: I think that would be  
4 permissible, Your Honor. First of all, you don't have  
5 an invasion of -- you don't have a physical intrusion,  
6 unlike this case. People nowadays --

7 JUSTICE KENNEDY: You have -- you have a  
8 targeted invasion. It's over a period of time. It's  
9 over a long -- it's over a wide space, and it seems to  
10 me that -- it seems to me that you have to answer my  
11 question yes to be consistent with what you've said  
12 earlier.

13 MR. LECKAR: No, Your Honor. As I said  
14 earlier, that you can have an -- you can have an  
15 occasional video camera out there. People understand  
16 nowadays that there may be video cameras out in public  
17 space. The -- but we don't have any -- society does not  
18 expect or view it as reasonable to have the equivalent  
19 of a million video cameras following you everywhere you  
20 go.

21 A few video cameras, people know. They've  
22 cropped -- they've cropped up and they have been  
23 accepted. But this is a horse of an entirely different  
24 color. This is a small device that enables the  
25 government to get information of a vast amount of --

1 JUSTICE SOTOMAYOR: What a --

2 MR. LECKAR: The camera is one site --  
3 one --

4 JUSTICE SOTOMAYOR: What an unworkable rule  
5 with no -- tethered to no principle.

6 MR. LECKAR: I'm sorry?

7 JUSTICE SOTOMAYOR: What an unworkable rule  
8 tethered to no principle. A thousand video cameras may  
9 or may not be okay, depending on how large the city is?

10 MR. LECKAR: No, Justice Sotomayor. I think  
11 the workable rule and the simplest rule that should be  
12 adopted is this. I think the Court should say to the  
13 law enforcement agency: You came here looking for a  
14 rule; we are going to give you a rule. If you want to  
15 use GPS devices, get a warrant, absent exigent  
16 circumstances or another recognized exception to the  
17 Fourth Amendment, because of their capacity for -- to  
18 collect data that you couldn't realistically get;  
19 because of the vanishingly low cost, because of their  
20 pervasive nature, that you should get a warrant any  
21 time -- you must get a warrant any time you're going to  
22 attach a GPS to a citizen's effect or to a citizen's  
23 person.

24 CHIEF JUSTICE ROBERTS: Well, that gets back  
25 to Justice Scalia's question, which is you've got to



1     determine that there has been a search first before you  
2     impose the warrant requirement. And it seems to me that  
3     your -- the warrant requirement applies only with  
4     respect to searches, right?

5                   MR. LECKAR: That's -- and seizures.

6                   CHIEF JUSTICE ROBERTS: Okay. And seizures.  
7     So while it might seem like a good idea to impose the  
8     requirement on this particular technological device, you  
9     still have to establish that it's a search.

10                  MR. LECKAR: But if you know, if you the  
11     police agents know -- this is the deliberative process.  
12     These devices aren't used for just quick one-off  
13     surveillance. They are used to track people over time,  
14     as witness this case, every 10 seconds of the day for 28  
15     days.

16                  If you know you're going to do that and you  
17     know, Justice Roberts that this device -- this device  
18     has an amazingly invasive power and capacity. If you  
19     know you're going to do that and you're a law  
20     enforcement agent, then you do what they did originally.  
21     You get a warrant.

22                  CHIEF JUSTICE ROBERTS: Now we pushed your  
23     -- we pushed your friend to the limits of his theory.  
24     Your theory I take it would apply if you're going to do  
25     it for 3 minutes, right? Where is the car? You push a

1 button; it's 3 minutes; you say that's still a Fourth  
2 Amendment violation?

3 MR. LECKAR: Yes.

4 CHIEF JUSTICE ROBERTS: Don't talk about how  
5 long they are going to be doing it, or all the  
6 information. We have to test the validity on the theory  
7 of your proposition that it violates the Fourth  
8 Amendment to do this for 3 minutes.

9 MR. LECKAR: I -- I think it does, Your  
10 Honor, because of the -- society does not expect --  
11 society views it as objectively reasonable not to  
12 expect --

13 CHIEF JUSTICE ROBERTS: You said that  
14 several times. How do we tell? I mean, I don't know  
15 what society expects. I suppose if you ask people do  
16 you think it's a violation of privacy for the police to  
17 do this for no reason for a month, maybe they would come  
18 out one way. If you asked the people do you think the  
19 police have to have probable cause before they monitor  
20 for 5 minutes the movements of somebody they think is  
21 going to set off a huge bomb, maybe you get a different  
22 answer.

23 MR. LECKAR: You look to -- you look to the  
24 common law. You look to well established case law. You  
25 look to statutes in several jurisdictions; I think there

1 are seven or eight that said this sort of practice  
2 should be prohibited.

3 JUSTICE SCALIA: Excellent. Yes. Of course  
4 a legislature can take care of this, whether or not  
5 there is an invasion of privacy. And they can pick 5  
6 days 0 the of the air. You can't do it for any more  
7 than 5 days, or you can't do it to more than -- than 50  
8 people at a time. They can take care of all of that  
9 stuff.

10 We can't do that in a decision under the --  
11 under the Fourth Amendment.

12 MR. LECKAR: We have --

13 JUSTICE SCALIA: Why isn't this precisely  
14 the kind of a problem that you should rely upon  
15 legislatures to take care of?

16 MR. LECKAR: That's the same -- that's the  
17 same -- same problem that the United States advanced  
18 before this Court in the United States v. District  
19 Court; give it to Congress. And what this Court there  
20 did, it held a Fourth Amendment violation so far as  
21 domestic security is concerned and gave Congress  
22 suggestions. In this particular case I could probably  
23 give you 535 reasons why not to go to Congress --

24 (Laughter.)

25 MR. LECKAR: -- but let me suggest

1 something, Justice Scalia. What happened was the United  
2 States has adopted a shifting position. They came to  
3 this Court and they said we want a workable rule; give  
4 us a workable rule. You either overrule the D.C.  
5 Circuit, which you should not do, or give us a workable  
6 rule. Now they have said in their brief oh, let's take  
7 it to the legislature. They can't have it both ways.

8 JUSTICE BREYER: Can you take it to Congress  
9 the other way? I mean, can you say that a general  
10 search of this kind is not constitutional under the  
11 Fourth Amendment, but should Congress pick out a subset  
12 thereof, say the -- terrorism or where there is  
13 reasonable cause or like the FISA court or special  
14 courts to issue special kinds of warrants, that that's a  
15 different question which we could decide at a later  
16 time?

17 That's a negative way of -- I mean that way  
18 favors you in the result, but I've -- I've been looking  
19 for if there is a way of going to Congress to create the  
20 situations where they can do it, rather than the  
21 situations where they can't.

22 MR. LECKAR: Justice Breyer, that was  
23 exactly what Congress, what happened when the foreign  
24 intelligence surveillance courts were created. You hit  
25 it right on the nail. All this Court has to do is

1 decide the narrow question before it, which I've  
2 articulated several times.

3 JUSTICE SCALIA: I don't see why it's any of  
4 Congress's business if it's a -- if it's a purely  
5 intrastate operation. Congress can control police  
6 practices that don't violate the Fourth Amendment  
7 throughout the country. I mean, maybe interstate,  
8 interstate beepers and interstate tracking devices, yes,  
9 but so long as you track within -- within the State  
10 isn't that okay?

11 MR. LECKAR: No, Your Honor. First of all,  
12 let me refer to Chief -- to Justice Frankfurter's  
13 comments a long time ago in *Watts v. Indiana*: Justices  
14 are not ignorant of the law, what they know to be true  
15 as men and women, but other legislatures will follow  
16 Congress. But what we have here -- what we have here is  
17 a live case of controversy in which Antoine Jones'  
18 control of his vehicle and his car was converted into an  
19 electronic GPS electronic transceiver serving the  
20 government. So that case is here and it -- it needs to  
21 be decided. One doesn't need to address technologies  
22 that aren't here before the Court today. You could; we  
23 could venture down that road. We could discuss drone  
24 surveillance, we could discuss balloon surveillance and  
25 other types of surveillance, but we don't have to. It's

1 a narrow --

2 JUSTICE ALITO: There was a warrant -- there  
3 was a warrant in this case. This is a puzzling aspect  
4 of the case to me and maybe there -- it's irrelevant for  
5 present purposes. There was a warrant and the two  
6 violations of are violations of a statute and a rule,  
7 neither of which may carry an exclusionary rule sanction  
8 with them or exclusionary rule penalty with them.

9 It's not clear at all that there as a  
10 violation of the Fourth Amendment. So it's a little  
11 strange that we are deciding whether a warrantless  
12 search here would have been unconstitutional, when there  
13 was a warrant.

14 MR. LECKAR: They had the choice. They  
15 could have easily -- they could have gone back to the  
16 district judge and said -- given the district judge --

17 JUSTICE ALITO: No, that's not my point.  
18 The point is that the violation of the 10-day rule and  
19 the violation of the statutory prohibition on -- or  
20 maybe it's in the rule, the prohibition on the judge in  
21 the district the installation only in the district are  
22 not Fourth Amendment requirements.

23 MR. LECKAR: No. That's correct, Your  
24 Honor, but what we have -- what we have here is a  
25 warrantless intrusion. When -- when the warrant --

1 JUSTICE ALITO: Not a warrantless intrusion,  
2 there was a warrant.

3 MR. LECKAR: But the warrant was not in  
4 effect. At the -- at the time the -- the GPS was  
5 placed, Justice Alito, there was no warrant. There's a  
6 case this Court decided in the --

7 JUSTICE GINSBURG: I think that's been  
8 conceded by both sides and that's accepted by both  
9 sides. The warrant expired. There was no warrant. The  
10 government certainly could have gone back and said,  
11 judge, we didn't make it; we need a little more time;  
12 give us 10 more days.

13 MR. LECKAR: They could -- they could  
14 conceivably gone back there and explained to the  
15 district judge why they couldn't have installed it in  
16 that period of time. The --

17 JUSTICE ALITO: I think if you look at the  
18 lower court case law, you will find that a violation of  
19 the 10-day rule is not necessarily a violation of the  
20 Fourth Amendment. And --

21 MR. LECKAR: I understand that.

22 JUSTICE ALITO: -- doesn't vitiate the  
23 warrant. The warrant doesn't necessarily dissolve or  
24 evaporate when those 10 days expire.

25 MR. LECKAR: Your Honor --

1 JUSTICE ALITO: Maybe those cases are wrong.

2 MR. LECKAR: There is a 1920 Supreme Court  
3 decision decided during the Prohibition era that  
4 specifically said that when a warrant expires there is  
5 no warrant. When the 10-day rule in that case is  
6 expired, there is no warrant. We have a warrantless  
7 intrusion here. The government didn't have to do a  
8 warrantless intrusion.

9 I ask the Court to -- affirm.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Dreeben, 5 minutes.

12 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

13 ON BEHALF OF THE PETITIONER

14 MR. DREEBEN: Mr. Chief Justice, advancing  
15 technology cuts in two directions. Technological  
16 advances can make the police more efficient at what they  
17 do through some of the examples that were discussed  
18 today: cameras, airplanes, beepers, GPS. At the same  
19 time, technology and how it's used can change our  
20 expectations of privacy in the ways that Justice Alito  
21 was alluding to. Today perhaps GPS can be portrayed as  
22 a 1984-type invasion, but as people use GPS in their  
23 lives and for other purposes, our expectations of  
24 privacy surrounding our location may also change. For  
25 that --



1 JUSTICE KAGAN: Mr. Dreeben, that -- that  
2 seems too much to me. I mean, if you think about this,  
3 and you think about a little robotic device following  
4 you around 24 hours a day anyplace you go that's not  
5 your home, reporting in all your movements to the  
6 police, to investigative authorities, the notion that we  
7 don't have an expectation of privacy in that, the notion  
8 that we don't think that our privacy interests would be  
9 violated by this robotic device, I'm -- I'm not sure how  
10 one can say that.

11 MR. DREEBEN: Justice Kagan, I think the  
12 Court should decide that case when it comes to it. This  
13 was my fundamental point: this case does not involve  
14 universal surveillance of every member of this Court or  
15 every member of the society. It involves limited  
16 surveillance of somebody who was suspected of drug  
17 activity --

18 JUSTICE KENNEDY: You probably haven't had  
19 the opportunity to go on a vacation. A hypothetical.  
20 Suppose exactly these facts, only the police aren't  
21 involved. A neighbor does it to another neighbor in  
22 order to see where that neighbor is going, and when he  
23 finds out, he tells his wife and -- and other neighbors.  
24 Do you think that in most States, that would be an  
25 invasion of privacy?

1                   MR. DREEBEN: I'm willing to assume that it  
2 might be, Justice Kennedy, but I don't think that this  
3 Court measures the meets and bounds of the Fourth  
4 Amendment by State law invasions of privacy. The Court  
5 usually --

6                   JUSTICE KENNEDY: We measure it by  
7 expectations of privacy under the Katz test if -- that  
8 may or may not be controlling.

9                   MR. DREEBEN: Yes, but in Greenwood, the  
10 Court dealt with a case where California had outlawed  
11 taking somebody's garbage, and this Court said that did  
12 not define an expectation of privacy for purposes of --

13                   JUSTICE KENNEDY: It found that there was no  
14 expectation of privacy.

15                   MR. DREEBEN: Correct.

16                   JUSTICE KENNEDY: I'm asking you about this  
17 case, whether there would be an expectation of privacy  
18 -- on a general matter under tort law.

19                   MR. DREEBEN: I don't think so. And -- and  
20 the fact that something may be a tort for a private  
21 person doesn't mean it's a problem for the police to do  
22 it. For example, in the Dow Chemical case, where the  
23 police used -- EPA in that case actually used cameras to  
24 surveil an industrial plant. There was a claim that it  
25 would have violated trade secret law for anybody else to

1 do that. And the Court accepted that and said tort law  
2 doesn't define the boundaries of the Fourth Amendment.

3 In Knotts, the Court was very careful to  
4 reserve the possibility of 24-hour surveillance of every  
5 citizen in their persons and in their residences, saying  
6 we haven't seen that kind of abuse. If that kind of  
7 abuse comes up, the legislature is the best-equipped to  
8 deal with it, if in fact our society regards that as an  
9 unreasonable restriction on --

10 JUSTICE SOTOMAYOR: Do you have any idea of  
11 how many GPS devices are being used by Federal  
12 Government agencies and State law enforcement officials?

13 MR. DREEBEN: The Federal Government, I can  
14 speak to, and it's in the low thousands annually. It's  
15 not a massive universal use of an investigative  
16 technique. The FBI requires that there be some  
17 reasonable basis for using GPS before it installs it.  
18 And as a result, this is a technique that basically  
19 supplements visual surveillance rather than supplanting  
20 it all together.

21 There was visual surveillance that was  
22 directed at respondent. The GPS allowed it to be more  
23 effective. As Justice Kennedy's and I think Justice  
24 Scalia's hypotheticals illustrated, Respondent is  
25 essentially conceding that around-the-clock visual

1 surveillance through teams of agents would not have  
2 invaded any expectation of privacy.

3           This Court said in Knotts that police  
4 efficiency has never been equated with police  
5 unconstitutionality. The fact that GPS makes it more  
6 efficient for the police to put a tail on somebody  
7 invades no additional expectation of privacy that they  
8 otherwise would have had. The technology doesn't make  
9 something private that was previously public. When we  
10 go out in our cars, our cars have driver's licenses that  
11 we carry. We have license plates on the car. These are  
12 for the purpose of identification --

13           JUSTICE SOTOMAYOR: You don't seriously  
14 argue that there isn't a possessory interest in who puts  
15 something on your car, and who you -- like a -- a sign  
16 of some sort.

17           MR. DREEBEN: Oh, I think there would  
18 probably be some sort of State law possessory interests  
19 -- Mr. Chief Justice, may I finish? But there is no  
20 seizure, for the very reason that Justice Breyer  
21 described under the Katz case. This Court has said that  
22 -- that trespass is neither necessary nor sufficient to  
23 create a Fourth Amendment violation.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 Mr. Dreeben, counsel.

1                   The case is submitted.

2                   (Whereupon at 11:10 a.m., the case in the  
3 above-entitled matter was submitted.)

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